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94-280

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

TED GLEAVE

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This supplemental petition for a Writ of Certiorari is being submitted because petitioner's attorney, Mark Mahoney failed to address the issue herein, apparently for fear of retribution if petitioner was successful.

Although a criminal defendant is guaranteed the right to a speedy trial under the Sixth Amendment to the Constitution, that right for all practical purposes has become a legal myth.

Lawyers, instead of protecting that right, routinely ask for continuances to accommodate their business and social schedules and almost universally the continuance is improperly granted by the court as an "accommodation". Since the lawyer requested the continuance, the court recognizes that as a practical matter, the lawyer will never move to dismiss the indictment for a violation of 18 USC 3161.

Because of this quid pro quo between the lawyer, the prosecutor and the judge, more often than not a defendant's constitutional right to a speedy trial is abridged and goes unredressed because of the lawyer's reluctance to raise the issue.

Many lawyers, off the record, admit that if they were to prevail on

this issue they would never get another continuance which is vital to administering to as many clients as possible.

Although this issue was "weakly" raised on appeal to the Second Circuit, petitioner's counsel failed to address the issue on rehearing in spite of the fact the petitioner specifically requested counsel to do so. By all standards, the delay was egregious, (over 2 years and 7 months from indictment to trial) and the Second Circuit failed to even comment on the issue although in many cases in which the delay was far shorter they gave a detailed analysis of the disputed periods.

What is even more perplexing in this case is the Second Circuit appears to have turned aside earlier rulings involving "retroactive" continuances and also appears to be in disagreement with several other circuits on the issues raised herein.

Since this issue involves a constitutional right that is routinely abridged, that there is a division among the circuits and a favorable ruling would wipe out the petitioner's conviction, a Writ of Certiorari should issue.

BACKGROUND AND FACTS

The background and facts of this case are set forth in the petition submitted by petitioner's counsel, Mark Mahoney on the issue of standing to challenge the illegal search of his lawyer's office.

ARGUMENT

THE DEFENDANT WAS DENIED THE RIGHT TO A SPEEDY TRIAL

The Second Circuit's decision that Gleave's constitutional right to a speedy trial under the Sixth Amendment and 18 USC 3161 was not violated appears to be based on a rejection of two earlier opinions of that circuit in United States v. Tunnessenn, 763 F.2d 74 (1985) and United States v. Simmons, 782 F.2d 232 (1992), the Ninth Circuit's decision in United States Perez-Reveles, 715 F.2d 1348 (1983) & United States V. Hoslett, 998 F. 2d 648 (1993), the Sixth Circuit's decisions in United States v. Moran, 998 F.2d 1369 (1993) and United States v. Crawford, 982 F. 2d 199 (1993) and the Fifth Circuit's decisions in United States v. Castle, 906 F.2d 134 (1990) and United States v. Blackwell, No. 92-5076, 1994 WL 2267.

Due to a lack of any discussion relative to the excludable periods of delay in its opinion on the speedy trial issue it is impossible to determine whether or not the Second Circuit in fact disagrees with

its earlier opinions in Tunnessenn and Simmons, supra, but it is obvious that the Second Circuit disagrees with the holdings of the Fifth, Sixth and Ninth Circuits on the issues involved herein. Those six issues are as follows:

1. Retroactive continuances prohibited under Tunnessenn, supra.

2. That defendant does not have the authority to waive the speedy trial provision since the right to a speedy trial belongs to both the defendant and society under Blackwell, supra.

3. That the continuances granted under (h) (1-8) were not supported by recognized legally sufficient reasons under Perez-Reveles, supra.

4. That periods of time allowed by the trial court for the preparation of pretrial motions was not excludable under Moran, supra.

5. That when a defendant is joined with a codefendant and no severance has been granted only a "reasonable" time is allowed under United States v. Vasquez 918 F. 2d 329 (2nd. Cir. 1990)

6. That the government is only allowed a maximum of 10 days to transport a defendant and or witness who is in custody under Castle, supra.

In ruling that Gleave was brought to trial in a timely manner, the Court, without any formal analysis of the relevant time periods, implied that the continuances granted under 18 USC 3161 (h) were proper and appeared to suggest that because many of the continuances were allegedly requested by appellants they waived any chal-

lenge to the propriety of those continuances.

This ruling is at odds with two earlier Second Circuit decisions in United States v. Tunnessenn, (retroactive continuances) and United States v. Simmons, supra (delay to process a pretrial motion must be reasonable) and decisions of the Fifth, Sixth and Ninth Circuits relative to the granting of continuances and the exclusion of certain time periods.

The delays in this case were inordinately long and uncalled for. From arraignment to commencement of trial, over 21 months elapsed. Additionally, although Congress clearly indicated that continuances should "rarely" be granted, they were "routinely" granted, over 20 in all. In the United States v. Giambrone, 920 F.2d 176 (2nd Cir. 1990), this Court admonished the prosecutors in the Western District of New York for their flagrant disregard for the speedy trial rights of criminal defendants. At page 182 the Court said:

> Finally, Judge Arcara found that as this Court had observed in United States v. Kiszewski, a cavalier attitude toward speedy trial rights was characteristic of the United States Attorney's Office in the Western District of New York. In Kiszewski, we found it "disquieting that so many of our recent Speedy Trial Act opinions are in cases coming from the Western District," and noted that there was a strong suggestion of a Pattern of neglect." 877 F. 2d at 215.

The violation of the defendant's speedy trial rights in this case was far more egregious than in Giambrone supra. First, the prosecutor totally ignored this circuit's ruling in Tunnessenn. Second, no "legally sufficient" reasons were articulated when continuances were granted. Third, the government obviously misunderstood the Supreme Court's decision in Henderson v. United States, 106 S. Ct. 1871 (1986). In that case, the Court ruled that under subsection (F), any period of delay caused by any pretrial motion need not be reasonable. This case is not controlled by subsection (F) but rather is governed by (h) (7) which in contrast to the holding in Henderson, supra, only permits a "reasonable" delay. The Court was very cognizant of that fact and pointed it out at page 1875 at [1] where the Court said.

> in 3161 (h) (7), Congress provided for exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted,". Apart from this single instance, every other provision in 3161 (h) provides for exclusion of "any period of delay."

Because the defendants in this case were joined together and no severance had been granted, section (h) (7) is controlling. That section, often overlooked, only provides for a "reasonable" delay to

process a pretrial motion. Henderson, supra, does not apply. As the docket sheet clearly indicates, the processing of the pretrial motion to suppress the evidence obtained for the alleged illegal search of Knoll's law office took 364 days which was clearly "unreasonable" in light of this circuit's decision in Simmons, supra.

In that case, the court reiterated the parameters of what constituted a "reasonable" time to process a pretrial motion enunciated in an earlier decision of this circuit in United States v. Cobb, 697 F. 2d 38. At page 493, the Court said:

> After reviewing the district court's findings, we find that the district court did not process appellant's motions in a manner consistent with the dictates of the Act and conclude that at least three days of the 177 day period are not excludable under section 3161 (h) (1) (F). As appellant reminds us, the standard we set forth in Cobb is one of necessity, albeit reasonable necessity.....
>
> We are particularity troubled by the district court's approach to the submission of papers. There was evidently no briefing schedule; the parties were allowed to file papers at a leisurely pace, with gaps of almost three weeks between responses even on the second round of briefing.

The Court went on to point out that an 11 day delay in setting a

hearing date was unacceptable in light of the already protracted schedule. On page 494 the Court said:

> The same is true of the subsequent postponement until October 9. While a week's delay would obviously not ordinarily constitue a "long postponement" under Cobb, its effect was cumulative of earlier delays in an already protracted schedule.

In order to assist the Court in concluding that Gleave's speedy trial rights were violated, a detailed analysis is set forth below.

FEBRUARY 23, 1990 THROUGH APRIL 5, 1990

[42]

non-excludable days

The clock began to run the day after indictment on February and continued to run until the first pretrial action was filed on April 5, 1990. As the transcript of the status conference on March 5, 1990 clearly indicates, neither Gleave nor his attorney was present and no continuance was requested by Gleave to review discovery material or to prepare pretrial motions.

At a second status conference an March 20, 1990, Gleave's attorney merely advised the Court she was in the process of attaining copies of discovery material and that she would be in a position to advise the Court as to whether any discovery motions would be filed by March 23, 1990.

Since there is no transcript of that status conference in the record the only insight as to what occurred on that day is reflected in the fatally defective "speedy trial order" dated March 23, 1990, issued by the magistrate. A careful examination of that order clearly indicates that no continuance was granted nor did Gleave's attorney ask for a continuance. She merely advised the Court that she was in the process of obtaining copies of documents provided by the government and that she would be in a position to advise the Court whether any discovery motions would be filed by March 23, 1990. That order also clearly indicates Knoll was not present at that proceeding nor did he request a continuance.

Since the transcript of the status conference on March 5, 1990, clearly indicates that no continuance was asked for or granted, the magistrates "retroactive" speedy trial Order was fatally defective under United States v. Tunnessen. Additionally, the order was also defective since the magistrate failed to make the required finding under (B) (i-iv). See Perez-Reveles supra, and United States v. Brooks, 697 F.2d 517 (3rd. Cir. 1982). As a result, the 42 days between February 23, 1990 through April 5, 1990 when the first pretrial motions were filed were non-excludable.

The government incorrectly contends that the time during this period

was excludable since the defendants used this time to prepare and file pretrial motions.

Recently, both the Ninth and Sixth Circuits reversed convictions because the district court had improperly granted a continuance to prepare and file pre trial motions. In United States v. Hoslett, 998 F.2d 648 (9th Cir. 1993) the Court noted on page 656 that:

> The Report of the Senate Judiciary Committee is the only explicit Congressional discussion of a pretrial motions preparation exclusion and it provides us with substantial assistance in this case. The report constitutes clear evidence of a deliberate decision not to allow for the routine exclusion of pretrial motion preparation time from Speedy Trial Act calculations.

The Sixth Circuit in United States v. Moran, supra, also took note that statute does not provide for an exclusion to prepare pretrial motions. On page 1371 the Court said:

> The statute does not provide that a period allowed by the district court for the preparation of pretrial motions is to be excluded from the seventy-day computations.

MAY 15, 1990 THROUGH JULY 2, 1990

[48]

non excludable days

The pretrial discovery motion filed by Knoll was denied by the magistrate on May 7, 1990. An overlapping motion filed by Gleave for a bill of particulars was decided on May 14, 1990, at which time the clock again began to run and continued to run until July 2, 1990 when Knoll stopped the clock by filing a motion for a severance generating an additional 48 non-excludable day, bringing the total to 90 as of July 2, 1990.

On that same day, the defendants appeared before Judge Arcara and he set September 7, 1990 as the last day to file additional pretrial motions. Although Gleave's attorney "requested " as much time as we can have" to file pretrial motions Judge Arcara was in error by excluding an additional 60 some days to file pretrial motions.

As of the date of that status conference, July 2, 1990, over 4 months had elapsed since the defendants were arraigned. It suffices to say that in effect, they had already been granted a continuance in excess of four months to file pretrial motions and this 60 days (that neither defendant requested) allowed by the judge to file additional pre-motions was clearly non excludable.

SEPTEMBER 20, 1990 THROUGH NOVEMBER 1, 1990

[32]

non excusable days

Judge Arcara denied the severance motions filed by both Gleave and Knoll on September 20, 1990 at which time the clock again began to run. On September 12, 1990, the Court filed a "speedy trial order" indicating that a continuance was being granted from September 10, 1990 through October 15, 1990 pursuant to 3161 (h) (1)) (F) but the order failed to articulate any reason[s] for granting the continuance.

On October 2, 1990, the Court granted an additional continuance which excluded the time from September 26, 1990 through November 15, 1990 pursuant to 3161 (h) (1) (F). Again the order was bereft of any reason[s] that would justify the granting of that continuance. Since there is no transcript in the record of the pretrial conference referred to in that order, we can only speculate that the Court's calendar was congested and this was a way of alleviating the problem, which, of course, is a prohibited practice.

All the Circuits agree, when a continuance is granted, the judge must set forth his reasons either orally or in a written order. See Perez-Reveles, supra, United States v. Crawford, 982 F. 2d 199 (6th

Circuit 1993), United States v. Brooks, 697, F. 2d 517 (3rd. Cir 1982), United States. Since Judge Arcara's orders of September 12 and 26, 1990, are devoid of any reasons whatsoever that would justify the granting of those continuances, no motions were pending and the defendants had almost 7 months since arraignment to prepare pretrial motions. Accordingly, the time between September 20, 1990 and November 1, 1990 (32 days) must be considered non excludable, bringing

the total as of November 1, 1990, when Knoll filed a suppression motion, to 122 non excludable days.

NOVEMBER 1, 1990 THROUGH OCTOBER 29, 1991

[over 180]
non excludable days

Both Knoll and Gleave filed motion to suppress evidence and to dismiss the indictment on November 1, 1990.

On November 16, 1990, Judge Arcara filed an order transferring the case to Judge Skretny. Although no reasons for the transfer are set forth in the record, it appears the transfer was made to alleviate calender congestion.

The suppression was not completed until August 8, 1991 some 8 months later and it is important to note that during this 8 month period the hearings only consumed a total of 8 "court days".

During this period, the Court continued the hearings on several occasions without citing any legally sufficient reasons for doing so which generated at least 160 additional non excludable days bringing the total as of October 29, 1991 to 302 non excludable days when the Court finally ruled on the suppression motions.

On October 29, 1991, the Court scheduled trial to commence on November 5, 1991 and, subsequently, denied the defendant's motions on October 29, 1991 (41 days after being taken under advisement).

In light of the Second Circuit's decisions in Simmons and Cobb, supra, as to what constitutes a "reasonable" time to process a pretrial motion, clearly the 363 days to process a suppression motion that only required 8 full court days of hearings was not even close to being "reasonable."

OCTOBER 18, 1991 THROUGH OCTOBER 29, 1991

[11]

non excludable days

Although the government may argue the question of what constitutes

a "reasonable" time to process a pretrial motion, certain periods of time are definitely non excludable. As the docket sheets indicate, Judge Skretny took the motions under advisement on September 18, 1991, the day the government filed its responding papers.

Section (h) (1) (J) expressly provides:

> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the Court.

As the docket sheets clearly indicate, Judge Skretny took 41 days to decide the motion and as a result the 11 extra days are non excludable.

FEBRUARY 18, 1991 THROUGH MARCH 18, 1991

[29]

non excludable days

The excessive delay by the government in producing Daniel Nowak who was in state custody for the suppression hearing generated at least 29 non excludable days. Knoll had advised the government before the hearings started on January 24, 1991 that he wanted to call Daniel Nowak as a witness. The government was aware that Judge Skretny would have to issue a writ of habeas

corpus ad testificandum so that Nowak could be produced for the hearing. That writ was not issued until February 8, 1991. Nowak was in a state prison some 4 hours from Buffalo. The marshals picked him up on March 6, 1991 but while in transit Nowak apparently became unruly and the marshals took him to a state facility instead of bringing him to Buffalo. He remained in state custody for 10 days for unexplained reasons and was finally produced at the hearing on March 18, 1991 some 39 days after the writ was issued.

Section (h) (1) (H) provides:

> (H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed unreasonable.

Although the above referred section refers to the transportation of a defendant, it clearly sets the parameters for others involved in a criminal proceeding over which the government has control. Since Nowak was within 4 hours of Buffalo, there is absolutely no reason why the marshals could not have left in the morning and

brought him to Buffalo in the same day. This excessive delay is precisely what the Act was intended to prohibit.

Since the writ of habeas corpus was issued by Judge Skretny on February 8, 1991, at a maximum, the government had until February 18, 1991 to produce Nowak in Buffalo. The 29 additional days it took the government to produce Nowalk are, therefore, non excludable. See United States v. Castle, supra.

The government contends that the entire period from the filing of the suppression motion on November 1, 1990 through October 29, 1991, when the motion was finally decided, was excludable under Henderson vs. United States 106 S. Ct. 1871 (1986).

The Court's ruling in Henderson is very often misunderstood. The Court's ruling in that case was limited to single defendant cases. On page 1875 at [1] the Court pointed out:

> Moreover, subsection (F) does not require that a period of delay be "reasonable' to be excluded, although Congress clearly knew how to limit an exclusion: in 3161 (h) (7), Congress provided for exclusion of a reasonable period of delay when the defendant was joined for trial with a codefendant as to \ whom the time for trial had has not run and no motion for severance has been granted.

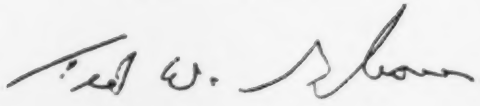
Since Gleave was joined for trial with Knoll and no severance was granted, 3161 (h) (7) was controlling, which provided for only a "reasonable" period of delay to process a pretrial motion.

In light of what the Second Circuit had concluded was a "reasonable" time to process a pretrial motion in Cobb and Simmons, clearly then the 8 months it took the resolve the suppression was not reasonable and, thus, the time was not excludable.

CONCLUSION

In sum, Gleaves was denied his right to a speedy trial guaranteed under the Sixth Amendment and there exists a conflict among the circuits on the issues raised herein which merits the granting of a Writ of Certiorari.

Respectfully submitted,



Ted Gleave